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7 Otto 413
Oct. 7. 1878.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~301~~ 301

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FAUSTO MORA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 7, 1876.

SUPREME COURT OF THE UNITED STATES.

No. 601.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FAUSTO MORA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between the United States of America, plaintiffs, against Fausto Mora, impleaded defendant, a manifest error hath happened, to the great damage of the said The United States of America, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and seventy-six, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the seventh day of October, in the year of our Lord one thousand eight hundred and seventy six.

JOHN I. DAVENPORT.

The foregoing writ is hereby allowed.
Oct. 7, 1876.

SAM'L BLATCHFORD.

2 (Indorsed:) U. S. Supreme Court. The United States, plaintiffs in error, against Fausto Mora, defendant in error. Writ of error. Filed Oct. 7, 1876.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to nineteen, inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of the United States of America, plaintiff in error, against Fausto Mora, impleaded, &c., defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this first day of November, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the said United States the one hundred and first.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

3 U. S. circuit court for the southern district of New York, in the second circuit.

Pleas before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at

the United States court buildings in the city of New York, of the term of April, 1876, to wit, of the seventh day of October, in the year of our Lord one thousand eight hundred and seventy-six.

Witness the honorable Alexander S. Johnson, one of the judges of the said circuit court.

JOHN I. DAVENPORT, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the 15th day of March, 1871, in October term of that year, before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court-buildings, in the city of New York, came the United States of America, by Noah Davis, esq., their attorney, and brought into the said court, before the aforesaid judges thereof, then there, their certain declaration against Fausto Mora (impleaded with Leon Haas & alias), being in custody, &c., of a plea of trespass on the case upon promises; which said declaration follows in these words, that is to say:

4 Circuit court of the United States for the second circuit, in February term, as yet of the 21st day of March, one thousand eight hundred and seventy-one.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The United States of America, plaintiffs in this suit, by Noah Davis, their attorney, complain of Leon Haas, j'r, Fausta Mora, W. W. Congreve, defendants in this suit, being in custody, &c., of a plea that they, the said defendants, render unto them, the said plaintiffs, the sum of twenty-one thousand and eighty-one dollars and seventy-four cents ($21,081.74), which they owe to and unjustly detain from them, the said plaintiffs.

For that whereas, heretofore, to wit, on or about the fourth day of March, in the year of our Lord one thousand eight hundred and

5 sixty-three, at the city of New York, in the said southern district of New York, the said defendants, by their certain writing obligatory, sealed with their seals, to the court here now shown, the date whereof is the same date and year, acknowledged themselves, their heirs, executors, and administrators, to be firmly bound unto the United States in the sum of twenty-one thousand and eighty one dollars and seventy-four cents to be paid to the said plaintiffs.

And the said plaintiffs say that the said writing obligatory was and is subject to a certain condition thereunder written, whereby it is provided that "If the ship or vessel called the Sarah Marsh, laden with various packages of merchandise (H), value $10,540.87, enumerated in the shipper's manifest of said Leon Haas, j'r, shall proceed from the port of New York to Matamoras, in Mexico, and shall land the same at the last-mentioned port of Matamoras for consumption; and if the same shall be consumed within the Republic of Mexico, and if the said shippers shall

6 within seven months from the date hereof produce satisfactory proof to the collector of the port of New York, by consular certificate or otherwise, that the same has been landed and entered for consumption and actually converted to domestic use within the Republic of Mexico, and the duties thereon paid; and if all the laws and departmental regulations shall be strictly obeyed; and if all the conditions of the clearance of said merchandise shall be performed, and specially if said merchandise or any part thereof shall not be transported to any place under insurrectionary control,

and if none of said merchandise shall be used in any way with the consent of or knowledge of the shippers or their agents to give aid or comfort to parties now in rebellion against the United States, then this obligation to be void; otherwise to be and remain in full force and virtue.

And the said plaintiffs, for assigning a breach of the condition of the said writing obligatory, in fact say, that after the making of the said
7 writing obligatory, to wit, at the city of New York, in the said southern district of New York aforesaid, the said ship or vessel, called the Sarah Marsh, & laden with merchandise, marked ◇H◇, and of the value of $10,540.87, of which said merchandise the said Leon Haas, j'r, was the shipper, did immediately after the execution of the said writing obligatory, and with the full knowledge of the said Leon Haas, j'r, proceed from the said port of New York to the port of Matamoras, in the Republic of Mexico, and did there land, to wit, at the port aforesaid, the said merchandise; but the said merchandise neither was, nor was intended by the said Leon Haas, j'r, to be landed at the said port of Matamoras for consumption, nor was consumed within the said Republic of Mexico.

And for a further breach of the condition of said writing obligatory, the plaintiffs say that the said Leon Haas, j'r, who was the shipper of the said merchandise as aforesaid, neither within seven
8 months from the date of the said writing obligatory, nor at any time, has produced any satisfactory proof to the collector of the port of New York, by consular certificate or otherwise, that the said merchandise was ever landed and entered at the said port of Matamoras or elsewhere in the republic of Mexico for consumption, or actually converted to domestic use within the republic of Mexico, or that the duties thereon were ever paid.

And for a further breach of the condition of the said writing obligatory, the said plaintiffs in fact say that the said merchandise or some part thereof was, with the consent and knowledge of the said Leon Haas, j'r, the shipper of said merchandise or his agents, transported to a place under insurrectionary control, to wit, to the State of Texas, which was at the time of said transportation and at the time of the execution of the said writing obligatory in armed insurrection against the
9 United States, and that the said merchandise or some part thereof was used with the consent and knowledge of the said Leon Haas, j'r, or of his agents, to give aid and comfort to parties then in rebellion against the United States.

By means of which said several premises the said writing obligatory became forfeited and the said plaintiffs have sustained damages to a large amount, to wit, to the amount of twenty-one thousand and eighty-one dollars and seventy-four cents, and thereby an action had accrued unto the said plaintiffs to demand and have of and from the said defendants the said sum of twenty-one thousand and eighty-one dollars and seventy-four cents.

Yet the said defendants, although often requested so to do, have not yet paid the sum of money above demanded, or any part thereof, to the said plaintiffs, and to pay the same have hitherto wholly refused and neglected, and still do neglect and refuse, to the damage of said
10 plaintiffs twenty-one thousand and eighty-one dollars and seventy-four cents, and therefore they bring their suit, &c.

NOAH DAVIS,
U. S. Att'y.

11 (Indorsed:) U. S. circuit court. The United States vs. Leon Haas, j'r, Fausta Mora, & W. W. Congreve. Declaration. Noah Davis, U. S. Att'y. Filed July 15, 1871.

12 U. S. circuit court, southern district of New York. In second circuit.

THE UNITED STATES
vs.
FAUSTO MORA, IMPLEADED WITH LEON HAAS, j'r. and W. M. Congreve.

SOUTHERN DISTRICT NEW YORK, *ss:*

First. And said defendant Fausto Mora, by Coudert Brothers, his attorneys, comes and defends the wrong and injury, where, &c., and prays judgment of the said declaration; because he says that whereas the said plaintiffs in their said delaration have set forth and described a certain supposed writing obligatory, and enumerating certain conditions, to which they allege the said supposed writing obligatory was and is subject, and have also alleged certain supposed breaches of the said conditions, they have nowhere in the said declaration cited any
13 statute of the United States, or any authority whatsoever by virtue of which said collector was authorized to exact or take from defendant any such supposed writing obligatory, or prescribe any such condition to said writing, and this he is ready to verify.

Whereupon, inasmuch as the said plaintiffs have shown in said declaration no authority in said collector, by virtue of which said supposed writing obligatory was taken or exacted, and such conditions attached thereto, nor any statute under which defendant would be liable for a breach of said conditions, said defendant prays judgment of said declaration, and that the same may be quashed.

Fausto Mora, one of the defendants, being duly sworn, deposes and says, that the above plea is true in substance and fact.

FAUSTO MORA.

Sworn to before me, this 28th day of March, A. D. 1873.

EMMET R. OLCOTT,
Notary Public, N. Y. City & Co.

Second. And the said Fausto Mora, defendant herein, by Coudert Brothers, his attorneys, comes and defends the wrong and injury, where, &c., and says that the supposed writing obligatory is not his
14 deed, and of this he puts himself upon the country.

Third. And for a further plea in this behalf the said defendant, by leave of the court, here for this purpose first had and obtained, says that the said plaintiffs ought not to have or maintain their aforesaid action thereof against him, because he says that the said supposed writing obligatory was obtained and exacted from the said Leon Haas, j'r, the principal on the said supposed writing obligatory, and the owner and shipper of the goods mentioned in said writing by the collector of the port of New York, under the authority of no act of Congress, nor by virtue of any right or power conferred upon said collector to exact any such writing from the said Haas. And this said defendant is ready to verify. Whereupon he prays judgment if the plaintiffs ought to have or maintain their aforesaid action thereof against him.

Fourth. And for a further plea in this behalf the said defendant, by

like leave of the court, here for this purpose first had and obtained, says
that the said plaintiff ought not to maintain or have his afore-
15 said action against him, because he says that the said Leon Haas,
j'r, executed the said supposed writing obligatory to the said collector of the port under compulsion, and to obtain a clearance of a large and valuable cargo of merchandise consigned to parties in the republic of Mexico, the said collector exacting the said supposed writing obligatory from the said Haas, neither under authority nor by virtue of any statute of the United States, nor by authority of any kind, but at his own instance, forcing the said Haas to give the said supposed writing obligatory before permitting him to prosecute his usual and legitimate business. And this said defendant is ready to verify. Wherefore he prays judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against him.

Fifth. And for a further plea in this behalf, the said defendant, by like leave of the court here for this purpose first had and obtained, says that the said plaintiffs ought not to have or maintain their aforesaid action thereof against him, because he says that the said supposed writing obligatory was obtained from the said Leon Haas at the said
16 city of New York, in the said southern district, by said plaintiffs,
by misrepresentation—that is to say, by the said plaintiffs, representing to the said Haas, to wit, at the said city and district of New York, that under certain statutes enacted by Congress he was required to execute to plaintiffs the said supposed writing obligatory, before he would be permitted to export certain goods specified in the said supposed writing obligatory to the republic of Mexico, to parties to whom he had contracted to send the said goods, and to whom he was bound by his said contract to send said goods. And thereupon said Haas, believing in the said misrepresentations, did execute the said supposed writing obligatory to plaintiffs. Wherefore defendant saith that the said supposed writing obligatory was and is void in law, and this said defendant is ready to verify. Wherefore he prays judgment if the said plaintiffs ought to have or maintain their aforesaid action against him.

Sixth. And for a further plea in this behalf the said defendant, by like leave of the court here for this purpose first had and obtained, says
that the said plaintiffs ought not to have or maintain their
17 aforesaid action against him, because he says that the said supposed
writing obligatory contains, among others, a certain condition, to wit, that the said goods "shall be consumed within the Republic of Mexico," and defendant avers that the term "shall be consumed," signifying the use to which the said goods should be put at any time after the landing of the same in the Republic of Mexico, purports to bind the said Haas, who was the shipper or owner of said goods, to regulate the ultimate consumption and final use to which the said goods should be put, if the said supposed writing obligatory were binding in law, which it was manifestly impossible that the said Haas could do. Wherefore, inasmuch as plaintiffs by the said supposed writing-obligatory sought to impose upon the said Haas a condition impossible of fulfillment and manifestly absurd, defendant says that said supposed writing obligatory was and is null and void in law and of no effect, and this he is ready to verify. Wherefore he prays judgment if the said plaintiffs ought to have or maintain their aforesaid action against him.

18 Seventh. And for a further plea in this behalf said defendant, by like leave of the court now here for this purpose first had and obtained, says that the said plaintiffs ought not to have or maintain their aforesaid action thereof against him, because he says that after the

arrival of the said vessel Sarah Marsh at Matamoras, as set forth in plaintiffs' declaration, with the said merchandise, the said merchandise was landed at the said port of Matamoras for consumption, and was intended by the said Haas to be landed at the said port for consumption, and was consumed within the Republic of Mexico.

And the said Haas, who was the shipper of the said merchandise, within seven months from the date of the said supposed writing obligatory, produced satisfactory proof to the collector of the port of New York, by consular certificate and otherwise, that the said merchandise was landed and entered at the said port of Matamoras, or elsewhere in the Republic of Mexico, for consumption, and that the same was actually converted to domestic use within the Republic of Mexico, and that the duties thereon were paid.

19 And defendant further alleges that none of the said merchandise was, with the consent or knowledge of said Leon Haas, j'r, the shipper of said goods, or his agents, transferred to any place under insurrectionary control, to wit, to the State of Texas, which was, at the time of said transportation, and at the time of the execution of said writing obligatory, in armed insurrection against the United States, and that none of the said merchandise was used with the consent and knowledge of said Leon Haas, or of his agent, to give aid and comfort to parties then in rebellion against the United States; and of this he puts himself upon the country, &c.

Eighth. And for a further plea in this behalf, the said defendant, by like leave of the court now here for the purpose first had and obtained, says that whereas the said supposed writing obligatory states as one of its conditions that the "said shippers shall within seven months of the date hereof," to wit, the date of the said supposed writing obligatory, "produce satisfactory proof to the collector of the port of New York, by consular certificate or otherwise, that the same," to wit, the said

20 merchandise, "has been landed and entered for consumption, and actually converted to domestic use within the Republic of Mexico, and the duties thereon paid"; and whereas the said declaration alleges as a breach of the said condition that the said Leon Haas, j'r, did not within seven months from date of the said "writing obligatory" produce any satisfactory proof to the collector of the port of New York, by consular certificate or otherwise, that the said merchandise was ever landed and entered at the said port of Matamoras, or elsewhere in the Republic of Mexico, for consumption, or actually converted to domestic use within the Republic of Mexico, or that the duties thereon were ever paid, defendant alleges that there is and was at the time of the making and sealing of the said supposed writing obligatory no statute of the United States, and no authority of any kind, by virtue of which the said collector was authorized to exact as a condition of said supposed writing obligatory that the above-mentioned proofs specifically set forth in the said declaration and supposed writing obligatory should be

21 produced by the said Leon Haas, j'r, shipper and owner of said merchandise, within seven months from the date of the said supposed writing obligatory; and this defendant is ready to verify. Wherefore he prays judgment if said plaintiffs ought to have or maintain their aforesaid action thereof against him.

Ninth. And for a further plea in this behalf, the said defendant, by like leave of the court for this purpose first had and obtained, says that he produced at the office of the collector, in the city of New York, in the said southern district of New York, within seven months after the giving of the said supposed writing obligatory, all the proofs demanded

by the said supposed writing obligatory for the cancellation thereof, and all the proofs required by the said collector for the cancellation thereof, and delivered the said proofs in writing to the said collector. who thereupon accepted and approved the same as full and sufficient for the cancellation of the said supposed writing obligatory, and promised at the time of such acceptance and approval to cancel the said sup-
22 -posed writing obligatory in consideration of the said proofs so presented, accepted, and approved as aforesaid.

And defendant alleges that by reason of the said delivery, acceptance, and approval of the said proofs by the said collector he became and was entitled to be discharged and was discharged from all liability on said supposed writing obligatory, and then the said supposed writing obligatory became null and void and of no effect; and this he is ready to verify. Whereupon defendant prays judgment if plaintiff's ought to have or maintain their aforesaid action thereof against him.

COUDERT BROTHERS,
Attorneys for the Defendant Fausto Mora.

23 (Indorsed:) U. S. cir. court, south. dist. of New York. The United States vs. Fausto Mora. Impleaded with Leon Haas, j'r, & W. M. Congreve. Plea. Coudert Brothers, att'ys for def't Fausto Mora. Filed M'ch 29, 1873.

24 And now, at this day, to wit, on the 14th day of January, 1875, in the city of New York, in the southern district of New York, before the honorable William J. Wallace, one of the justices of the circuit court aforesaid, according to the form of the statute in such case provided, come as well the within-named plaintiffs as the within-named defendant by their respective counsel and attorneys, and the jurors of the jury summoned to try the said issue being called, come, who to speak the truth of the matters within contained, being chosen, tried, and sworn, say upon their oath, by direction of the court, that the within-mentioned writing obligatory is not the deed of the said defendant as the plaintiffs have within in that behalf alleged.

Therefore it is considered that the defendant go thereof without day and the plaintiffs in mercy, &c.

Judgment signed this 7th October, 1876.

Clerk.

(Endorsed:) Filed Oct. 7, 1876.

25 In the circuit court of the United States for the southern district of New York.

THE UNITED STATES
against
FAUSTA MORA, IMPLEADED.

Bill of exceptions.

Be it remembered, that the above cause came on to be tried on the fourteenth day of January, 1875, before the Hon. William J. Wallace and a jury, whereupon M'r Sherman, assistant U. S. attorney, opened the case for the plaintiffs, and stated, among other things, that this action is brought on a bond exacted by the collector of the port of New York as a condition precedent to allowing the clearance of a certain schooner known as the Sarah Marsh, laden with a cargo of merchandise, and bound to the port of Matamoras, in Mexico.

arrival of the said vessel Sarah Marsh at Matamoras, as set forth in plaintiffs' declaration, with the said merchandise, the said merchandise was landed at the said port of Matamoras for consumption, and was intended by the said Haas to be landed at the said port for consumption, and was consumed within the Republic of Mexico.

And the said Haas, who was the shipper of the said merchandise, within seven months from the date of the said supposed writing obligatory, produced satisfactory proof to the collector of the port of New York, by consular certificate and otherwise, that the said merchandise was landed and entered at the said port of Matamoras, or elsewhere in the Republic of Mexico, for consumption, and that the same was actually converted to domestic use within the Republic of Mexico, and that the duties thereon were paid.

19 And defendant further alleges that none of the said merchandise was, with the consent or knowledge of said Leon Haas, j'r, the shipper of said goods, or his agents, transferred to any place under insurrectionary control, to wit, to the State of Texas, which was, at the time of said transportation, and at the time of the execution of said writing obligatory, in armed insurrection against the United States, and that none of the said merchandise was used with the consent and knowledge of said Leon Haas, or of his agent, to give aid and comfort to parties then in rebellion against the United States; and of this he puts himself upon the country, &c.

Eighth. And for a further plea in this behalf, the said defendant, by like leave of the court now here for the purpose first had and obtained, says that whereas the said supposed writing obligatory states as one of its conditions that the "said shippers shall within seven months of the date hereof," to wit, the date of the said supposed writing obligatory, "produce satisfactory proof to the collector of the port of New York, by consular certificate or otherwise, that the same," to wit, the said

20 merchandise, "has been landed and entered for consumption, and actually converted to domestic use within the Republic of Mexico, and the duties thereon paid"; and whereas the said declaration alleges as a breach of the said condition that the said Leon Haas, j'r, did not within seven months from date of the said "writing obligatory" produce any satisfactory proof to the collector of the port of New York, by consular certificate or otherwise, that the said merchandise was ever landed and entered at the said port of Matamoras, or elsewhere in the Republic of Mexico, for consumption, or actually converted to domestic use within the Republic of Mexico, or that the duties thereon were ever paid, defendant alleges that there is and was at the time of the making and sealing of the said supposed writing obligatory no statute of the United States, and no authority of any kind, by virtue of which the said collector was authorized to exact as a condition of said supposed writing obligatory that the above-mentioned proofs specifically set forth in the said declaration and supposed writing obligatory should be

21 produced by the said Leon Haas, j'r, shipper and owner of said merchandise, within seven months from the date of the said supposed writing obligatory; and this defendant is ready to verify. Wherefore he prays judgment if said plaintiffs ought to have or maintain their aforesaid action thereof against him.

Ninth. And for a further plea in this behalf, the said defendant, by like leave of the court for this purpose first had and obtained, says that he produced at the office of the collector, in the city of New York, in the said southern district of New York, within seven months after the giving of the said supposed writing obligatory, all the proofs demanded

by the said supposed writing obligatory for the cancellation thereof, and all the proofs required by the said collector for the cancellation thereof, and delivered the said proofs in writing to the said collector. who thereupon accepted and approved the same as full and sufficient for the cancellation of the said supposed writing obligatory, and promised at the time of such acceptance and approval to cancel the said sup-
22 -posed writing obligatory in consideration of the said proofs so presented, accepted, and approved as aforesaid.

And defendant alleges that by reason of the said delivery, acceptance, and approval of the said proofs by the said collector he became and was entitled to be discharged and was discharged from all liability on said supposed writing obligatory, and then the said supposed writing obligatory became null and void and of no effect; and this he is ready to verify. Whereupon defendant prays judgment if plaintiff's ought to have or maintain their aforesaid action thereof against him.

COUDERT BROTHERS,
Attorneys for the Defendant Fausto Mora.

23 (Indorsed:) U. S. cir. court, south. dist. of New York. The United States vs. Fausto Mora. Impleaded with Leon Haas, j'r, & W. M. Congreve. Plea. Coudert Brothers, att'ys for def't Fausto Mora. Filed M'ch 29, 1873.

24 And now, at this day, to wit, on the 14th day of January, 1875, in the city of New York, in the southern district of New York, before the honorable William J. Wallace, one of the justices of the circuit court aforesaid, according to the form of the statute in such case provided, come as well the within-named plaintiffs as the within-named defendant by their respective counsel and attorneys, and the jurors of the jury summoned to try the said issue being called, come, who to speak the truth of the matters within contained, being chosen, tried, and sworn, say upon their oath, by direction of the court, that the within-mentioned writing obligatory is not the deed of the said defendant as the plaintiffs have within in that behalf alleged.

Therefore it is considered that the defendant go thereof without day and the plaintiffs in mercy, &c.

Judgment signed this 7th October, 1876.

Clerk.

(Endorsed:) Filed Oct. 7, 1876.

25 In the circuit court of the United States for the southern district of New York.

THE UNITED STATES
against
FAUSTA MORA, IMPLEADED.

Bill of exceptions.

Be it remembered, that the above cause came on to be tried on the fourteenth day of January, 1875, before the Hon. William J. Wallace and a jury, whereupon M'r Sherman, assistant U. S. attorney, opened the case for the plaintiffs, and stated, among other things, that this action is brought on a bond exacted by the collector of the port of New York as a condition precedent to allowing the clearance of a certain schooner known as the Sarah Marsh, laden with a cargo of merchandise, and bound to the port of Matamoras, in Mexico.

To support the issues on their part the plaintiffs proved that on
26 the 23rd day of May, 1862, the then Secretary of the Treasury had instructed the then collector of customs at the port of New York as follows:

TREASURY DEPARTMENT,
Washington, D. C., May 23rd, 1862.

SIR: In pursuance of the provisions of the proclamation of the President modifying the blockade of the ports of Beaufort, Port Royal,
27 and New Orleans, and of the regulations of the Secretary of the Treasury relating to trade with those ports, no articles contraband of war will be permitted to enter at either of said ports, and you will accordingly refuse clearance to vessels bound for those ports, or either of them, with any such articles on board.

Until further instructed, you will regard as contraband of war the following articles, viz: Cannons, mortars, fire-arms, pistols, bombs, grenades, fire locks, flints, matches, powder, saltpetre, balls, bullets, pikes, swords, sulphur, helmets, or boarding caps, sword-belts, saddles and bridles (always excepting the quantity of the said articles which may be necessary for the defence of the ships and of those who compose the crew), cartridge-bag material, percussion and other caps, clothing adapted for uniforms, resin, sail-cloth of all kinds, hemp and cordage, masts, ship timber, tar and pitch, ardent spirits, military persons in the service of the enemy, dispatches of the enemy, and articles of like character with those specially enumerated.

28 You will also refuse clearance to all vessels which (whatever the ostensible destination) are believed by you, on satisfactory ground, to be intended for ports or places in possession or under control of insurgents against the United States; or that there is imminent danger that the goods, wares, and merchandize of whatever description, laden on such vessels, will fall into the possession or under the control of such insurgents; and in all cases where, in your judgment, there is ground for apprehension that any goods, wares, or merchandise shipped at your port will be used in any way for the aid of the insurgents or the insurrection, you will require substantial security to be given that such goods, wares, or merchandize shall not be transported to any place under insurrectionary control, and shall not, in any way, be used to give aid or comfort to such insurgents.

You will be especially careful, upon application for clearances, to require bonds with sufficient sureties, conditioned for fulfilling faithfully all the conditions imposed by law or departmental regulations from
29 shippers of the following articles, to the ports opened, or to any other ports from which they may easily be, and are probably intended to be, reshipped in aid of the existing insurrection, namely: Liquors of all kinds, coals, iron, lead, copper, tin, brass, telegraphic instruments, wires, porous caps, platina, sulphuric acid, zinc, and all other telegraphic materials, marine engines, screw propellers, paddle-wheels, cylinders, cranks, shafts, boilers, tubes for boilers, fire-bars, and every article, or any other component part of an engine or boiler, or any article whatever which is, can, or may become applicable for the manufacture of marine machinery, or for the armor of vessels.

I am, &c.,

S. P. CHASE,
Sec'ty of the Treasury.

HIRAM BARNEY,
Coll. of N. York.

Further to support the issues on their part, the plaintiffs proved that the following bond was taken by the said collector of customs, as
30 the condition of granting a clearance to the ship Sarah Marsh to proceed from the port of New York to the port of Matamoras in Mexico.

Indemnity bond.

Know all men by these presents, that we, Leon Haas, j'r, as principal, and Foster Mora and W. M. Congreve, all residing and owning real estate in the city of New York, are held and firmly bound unto the United States of America, in the sum of twenty-one thousand eighty-one $\frac{74}{100}$ ($21,081.74) dollars lawful money of the United States of America, to be paid to the said The United States of America or their assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents; sealed with our seals, dated the fourth day of March, one thousand eight hundred and sixty-three.

Now the condition of this obligation is such that if the ship or vessel called the Sarah Marsh, laden with various packages of merchandize,

◇H◇ value $10,540.87, enumerated in the shipper's manifest of said
31 Leon Haas, j'r, shall proceed from the port of New York to Matamoras, in Mexico, and shall land the same at the last-mentioned port of Matamoras for consumption, and if the same shall be consumed within the republic of Mexico, and if the said shippers shall, within seven months from the date hereof, produce satisfactory proof to the collector of the port of New York, by consular certificate or otherwise, that the same has been landed and entered for consumption, and actually converted to domestic use, within the republic of Mexico, and the duties thereon paid, and if all laws and departmental regulations shall be strictly obeyed; and if all the conditions of the clearance of said merchandise shall be performed, and specially if said merchandise or any part thereof shall not be transported to any place under insurrectionary control, and if none of said merchandise shall be used in any way, with the consent or knowledge of the shippers or their agents, to give aid or comfort to parties now in rebellion against the United States, then this obligation to be void; otherwise to be and remain in full force and virtue.

32 LEON HAAS, JUN'R. [SEAL.]
FAUSTO MORA. [SEAL.]
W. M. CONGREVE. [SEAL.]

Signed, sealed and delivered in presence of—
PLEM WM.

STATE OF NEW YORK,
City and County of New York, ss:

On this fourth day of March, A. D. 1863, before me personally appeared the within-named Leon Haas, j'r, Fausto Mora, & W. M. Congreve, to me known to be the individuals described in, and who executed the foregoing instrument, and severally acknowledged that they executed the same.

[L. S.] J. KENT BOYD,
Notary Public.

And that such clearance was granted.

And the plaintiffs then offered in evidence partial manifest of the cargo of the Sarah Marsh relative to the goods represented by the bond on which this action was brought, which manifest showed the portion of the cargo in question to be of the value of $10,540.87, and also proved that the Sarah Marsh was a general ship, and that other parts
33 of her cargo were owned by others than the principal and sureties on the bond in question; that the Sarah Marsh proceeded out of the port of New York to the port of Matamoras.

Further to sustain the issues on their part, the plaintiff offered to prove that the Sarah Marsh proceeded out of the port of New York toward Matamoras, which is conceded by defendant's counsel. Plaintiff's counsel offers to prove that that part of the cargo of the Sarah Marsh referred to in the condition of the obligation in suit, marked ⟨H⟩, value stated at $10,540.87, enumerated in the shipper's manifest of Leon Haas, j'r, 'proceeded in the Sarah Marsh, in March or April, 1863, to the mouth of the Rio Grand'; that said merchandise was not landed at the port of Matamoras for consumption; that it was not consumed within the Republic of Mexico; that the shippers did not, within seven months from the date of said obligation, produce satisfactory proof to the collector of the port of New York, by consular certificate or in any manner whatever, that said merchandise had been landed
34 and entered for consumption and actually appropriated to domestic use within the Republic of Mexico, ro that the duties thereon had been paid; that the laws and departmental regulations in respect to non-intercourse with portions of the United States in rebellion, and particularly in respect to intercourse with Texas, were not strictly or in any manner obeyed in respect to said goods, and that none of the conditions of the clearance of said merchandise were performed, and especially that said merchandise, and large parts thereof, were transported by the principal in this bond, and by his authorized agents, directly to places under insurrectionary control, and were used with his consent and knowledge, and with the consent and knowledge of his agents, to give aid and comfort to parties then in rebellion against the United States, and specially that part of the cargo represented by this bond was sold to the military authorities of the so-called Confederate States in Brownsville, Texas, some time in the month of April, 1863.

The defendant's counsel objected, which objection the court sustained, and the plaintiffs' counsel then and there prayed their exception, which was then and there noted and allowed.

35 Upon motion of defendant's counsel, the court then and there directed a verdict for the defendant, to which direction plaintiffs' counsel then and there prayed their exception, which was then and there noted and allowed.

And thereupon the jury rendered a verdict for the defendant in accordance with such direction.

The plaintiffs' counsel then and there, by its counsel, prayed this [their bill of exceptions, which is signed and sealed accordingly.

WM J. WALLACE,
U. S. Dist. Judge.

(Endorsed:) U. S. circuit court, southern district of New York. United States vs. Fausto Mora. Bill of exceptions. George Bliss, United States attorney for the southern district of New York. Filed Oct. 4, 1876.

36 In the Supreme Court of the United States of October term, 1876.

THE UNITED STATES OF AMERICA, PLAINTIFFS IN ERROR,
vs.
FAUSTO MORA, IMPLEADED, DEFENDANT IN ERROR.

Afterwards, to wit, on the third Monday of October, 1876, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, come the said United States, by George Bliss, esquire, their attorney, and say that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid there is error in the several rulings of the said circuit court, to which exception has been taken; and that by the record aforesaid it appears that judgment aforesaid, in form aforesaid given, was given for the said defendant against the said plaintiffs, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs in
37 error against the said defendant in error, and the said plaintiffs pray that the judgment aforesaid, for the errors aforesaid and other errors in the record and proceedings aforesaid, as the same appear more fully therein, may be reversed, annulled, and altogether held for nothing, and that they, the plaintiffs, may be restored to those things which they have lost by reason of said judgment.

GEORGE BLISS,
U. S. Attorney for the Southern District of New York.

(Endorsed:) U. S. Supreme Court. The U. S. vs. Fausto Mora, impleaded, &c., def't in error. Assignment of error. George Bliss, U. S. att'y. Filed Oct. 31st, 1876.

38 UNITED STATES OF AMERICA, *ss:*

To Fausto Mora, greeting:

You are hereby cited and admonished to be and appear at a supreme court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and seventy-six, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein the United States of America are plaintiffs in error and you are defendant in error to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to parties in that behalf.

SAM'L BLATCHFORD.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this seventh day of October, in the year of our Lord one thousand eight hundred and seventy-six.

JOHN I. DAVENPORT,
Clerk.

38 (Indorsed:) U. S. Supreme Court. The United States, plaintiffs in error, against Fausto Mora, defendant in error. Citation.

To COUDERT BRO'S, *Def't's Att'ys:*

GENTS: Take notice of the within citation, a copy of which is herewith served upon you.

Yours, truly,

GEO. BLISS,
U. S. Att'y.

Filed Oct. 27, 1876.

Service of a copy of citation within & of the notice endorsed hereupon admitted this 13th day of October, 1876.

COUDERT BRO'S,
Def't's Att'ys.

(Indorsement on cover:) No. 601. The United States, plaintiff in error, vs. Fausto Mora. S. New York, C. C. U. S. Filed 7th November, 1876.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

UNITED STATES
v.
FAUSTO MORA. } No. 601.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

UNITED STATES
v.
FAUSTO MORA. } No. 601.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT.

Suit upon a bond dated and executed March 4, 1863, exacted by the collector of the port of New York as a condition precedent to granting a clearance to the schooner Sarah Marsh, laden with a cargo of merchandise, bound to the port of Matamoros, in Mexico. (Record, 9.)

The Secretary of the Treasury had instructed the collector at New York, on the 23d day of May, 1862, among other things relating to such trade, to "*refuse clearance to all vessels which* (whatever the ostensible destination)

are believed by you, on satisfactory ground, *to be intended for ports or places in possession or under control of insurgents* against the United States; or that there is imminent danger that the goods, wares, and merchandise, of whatever description, laden on such vessels, will fall into the possession or under the control of such insurgents; and *in all cases where*, in your judgment, *there is ground for apprehension that any goods*, wares, or merchandise shipped at your port *will be used in any way for the aid of the insurgents* or the insurrection, you will require SUBSTANTIAL SECURITY *to be given* that such goods, wares, or merchandise shall not be transported to any place under insurrectionary control, and shall not, in any way, be used to give aid or comfort to such insurgents." (Record, 8; folio 28.)

He is further told that as to vessels carrying specified articles to particular ports mentioned, he "will be especially careful, upon application for clearances, to require *bonds with sufficient sureties*, conditioned for fulfilling faithfully all the conditions imposed by law or departmental regulations." (*Ib.*, and folio 29.)

Acting under these instructions, and upon his belief, in the exercise of his judgment and official discretion, the collector exacted the bond in suit, which contained this condition:

"Now the condition of this obligation is such that if the ship or vessel called the Sarah Marsh, laden with various packages of merchandise, ⟨H⟩, value $10,540.87, enumerated in the shipper's manifest of said Leon Haas, jr., shall proceed from the port of New York to Matamoros, in Mexico, and shall land the same at the last-mentioned port of Matamoros for consumption, and if the same shall be consumed within the Republic of

Mexico, and if the said shippers shall, within seven months from the date hereof, produce satisfactory proof to the collector of the port of New York, by consular certificate or otherwise, that the same has been landed and entered for consumption, and actually converted to domestic use, within the Republic of Mexico, and the duties thereon paid, and if all laws and departmental regulations shall be strictly obeyed; and if all the conditions of the clearance of said merchandise shall be performed, and specially if said merchandise or any part thereof shall not be transported to any place under insurrectionary control, and if none of said merchandise shall be used in any way, with the consent or knowledge of the shippers or their agents, to give aid or comfort to parties now in rebellion against the United States, then this obligation to be void; otherwise to be and remain in full force and virtue." (Record, 9.)

Clearance was thereupon granted.

The plaintiffs then offered in evidence partial manifest of the cargo of the Sarah Marsh relative to the goods represented by the bond on which this action was brought, which manifest showed the portion of the cargo in question to be of the value of $10,540.87, and also proved that the Sarah Marsh was a general ship, and that other parts of her cargo were owned by others than the principal and sureties on the bond in question; that the Sarah Marsh proceeded out of the port of New York to the port of Matamoros; and further offered to prove that the Sarah Marsh proceeded out of the port of New York toward Matamoros, which is conceded by defendant's counsel. Plaintiff's counsel offers to prove that that part of the cargo of the Sarah Marsh referred to in the condition of the obligation in suit, marked "◇H◇",

value stated at $10,540.87, enumerated in the shipper's manifest of Leon Haas, jr.," proceeded in the Sarah Marsh, in March or April, 1863, to the mouth of the Rio Grande; that said merchandise was not landed at the port of Matamoros for consumption; that it was not consumed within the Republic of Mexico; that the shippers did not, within seven months from the date of said obligation, produce satisfactory proof to the collector of the port of New York, by consular certificate or in any manner whatever, that said merchandise had been landed and entered for consumption and actually appropriated to domestic use within the Republic of Mexico, or that the duties thereon had been paid; that the laws and departmental regulations in respect to non-intercourse with portions of the United States in rebellion, and particularly in respect to intercourse with Texas, were not strictly or in any manner obeyed in respect to said goods, and that none of the conditions of the clearance of said merchandise were performed, and especially that said merchandise, and large parts thereof, were transported by the principal in this bond, and by his authorized agents, directly to places under insurrectionary control, and were used with his consent and knowledge, and with the consent and knowledge of his agents, to give aid and comfort to parties then in rebellion against the United States, and especially that part of the cargo represented by this bond was sold to the military authorities of the so-called Confederate States, in Brownsville, Texas, some time in the month of April, 1863.

The defendant's counsel objected, which objection the court sustained, and the plaintiffs' counsel then and there prayed their exception, which was then and there noted and allowed.

Upon motion of defendant's counsel, the court then and there directed a verdict for the defendant, to which direction plaintiffs' counsel then and there prayed their exception, which was then and there noted and allowed.

And thereupon the jury rendered a verdict for the defendant in accordance with such direction. (Record, 10.)

Assignment of Errors.

The plaintiff in error assigns for error—

1st. The exclusion by the judge of the offered testimony above mentioned.

2d. The direction to render a verdict for the defendant as above stated.

3d. The verdict and judgment rendered in accordance with such direction.

BRIEF.

By the first section of the act of May 20, 1862, c. 81 (12 Stats., 404), the Secretary of the Treasury was authorized to refuse a clearance to any vessel whose cargo he has satisfactory reason to believe intended for places under the control of the insurgents; and any vessel attempting to depart after a clearance has been refused by him "*or by his order*" shall be forfeited with her cargo, &c.

The second section authorizes a collector, whenever he grants a clearance for *any* port, foreign or domestic, "if he shall deem it necessary under the circumstances of the case, to require *a bond* to be executed by the master or owner of the vessel, in a penalty equal to the value of the cargo, and with sureties to the satisfaction of such collector, that the said cargo shall be delivered at the destination for which it is cleared or permitted, and that no part thereof shall be used in affording aid or comfort to any person or parties in insurrection against the authority of the United States." (12 Stats., 404.)

The Secretary of the Treasury is "further empowered," by the third section, "to prohibit and prevent the transportation in any vessel, * * * * of any goods," &c., where there are satisfactory reasons to believe that such goods are intended for any place under the control of the insurgents; or that there is danger they will come into the insurgents' possession; "and he is further authorized, in all cases where he shall deem it expedient so to do, to require *reasonable security* to be given, that goods, wares, or merchandise shall not be transported

to any place under insurrectionary control, and shall not in any way be used to give aid and comfort to such insurgents; and he may establish all such *general* or special regulations as may be necessary or proper to carry into effect the purposes of this act." (12 Stats., 404 and 405.)

I.

Common law rules govern this bond. (Cox *v.* United States, 6 Peters, 172.

The adverse ruling of the presiding judge is supposed to be based upon the variance of the above-recited condition from the statutory language of the second section of the act aforesaid, in that it was not given "by the master or owner of the vessel," nor "in a penalty equal to the value of the cargo."

The collector might have refused a clearance.

He had a right to exact a bond in the form required by section 2, above named. If the person desiring to export the goods, on failure or refusal of the master or owner of the vessel to give the required bond, chose to offer his own obligation and the collector chose to accept it, it was a voluntary bond, and good and enforceable at law. (United States *v.* Hodsdon, 10 Wallace, 395; Hamilton *v.* Dillin, 21 Wall., 73; United States *v.* Woolen Goods, 1 Paine, 435, citing cases.)

In Maine, Massachusetts, and other States there are statutes prescribing the bonds to be given by persons under arrest to procure release; yet it has been held, in decisions too numerous to mention, that bonds varying from the statutory form are good at common law.

A bond not required by law of the person from whom, or in the form in which, it is given is good at common law. (United States *v.* Tinzey, 5 Peters, 115; Kavanagh *v.* Sanders, 8 Maine, 422, and many other cases.) Any portion of such bond not required by statute may be rejected. (*Id.*)

II.

As to this defendant, it was clearly voluntary. His goods were not detained, nor he in any wise affected. He chose to come in as a mere volunteer, and to give this bond.

III.

It was the duty of every person protected by our laws, whether alien or citizen, to refrain from giving aid and comfort to the enemy. A bond (even if not directly authorized by statute) binding one to perform a legal duty can be legally given and accepted.

IV.

The general regulations communicated by the Secretary of the Treasury to the collector authorize the latter to require this "reasonable security" to be given, under the third section of the act aforesaid, if it does not come under the preceding one.

EDWIN B. SMITH,
Assistant Attorney-General.

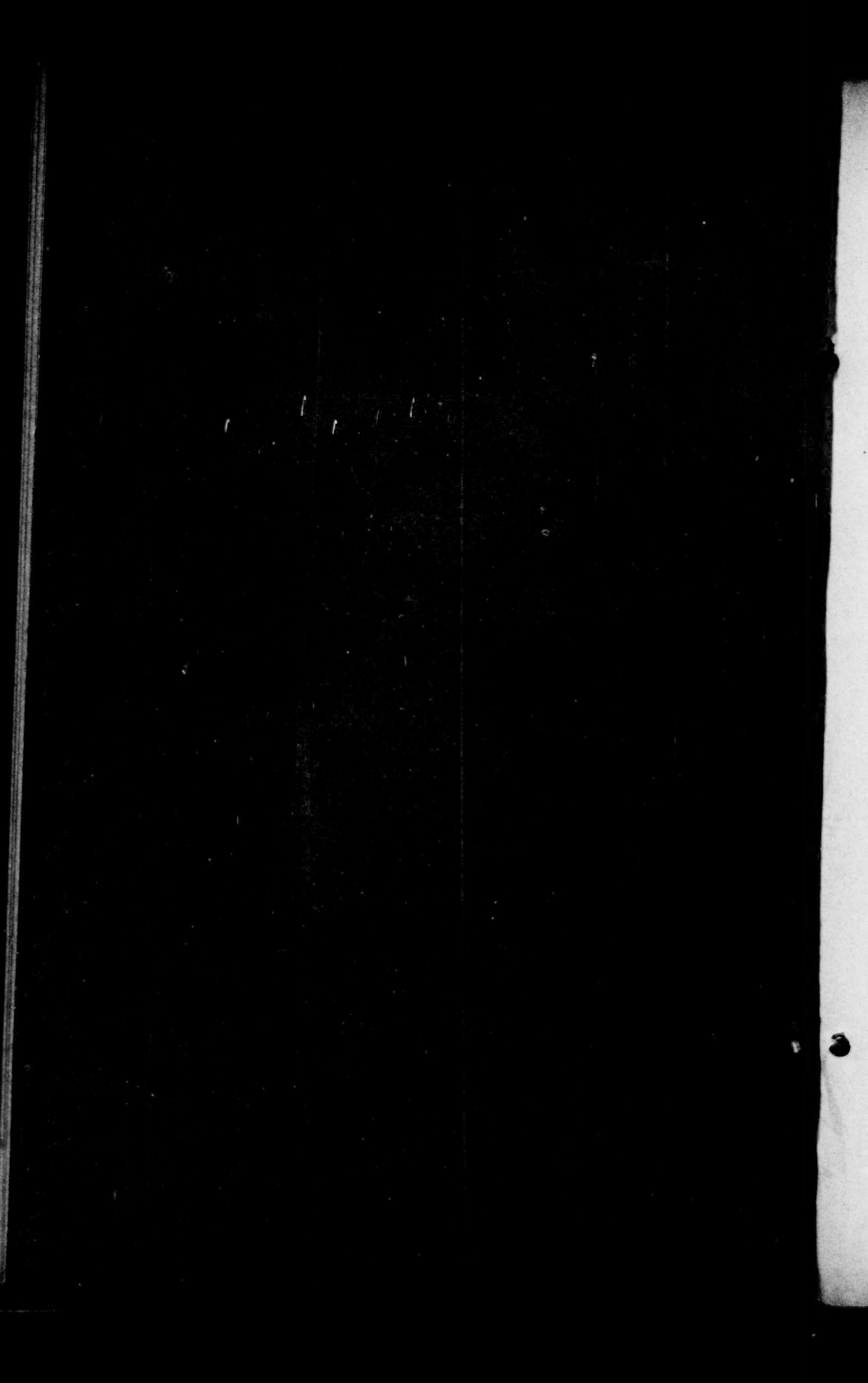
In the Supreme Court of the United States.

OCTOBER TERM, 1878.

UNITED STATES
v.
FAUSTO MORA. } No. 301.

ERROR TO CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

PLAINTIFFS' REPLY.



In the Supreme Court of the United States.

OCTOBER TERM, 1878.

UNITED STATES
v.
FAUSTO MORA. } No. 301.

ERROR TO CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

PLAINTIFFS' REPLY.

BRIEF.

The plaintiffs' original brief in this cause was very hastily prepared last term, when it was advanced with many other (tariff) cases, under the expectation that it would be orally argued; now that the defendant desires its submission, a brief reply to his suggestions will be made.

The act of May 20, 1862, c. 81 (so far as its provisions affect this case), reads as follows:

Be it enacted, &c., That the Secretary of the Treasury, in addition to the powers conferred upon him by the act of the thirteenth of July, eighteen hundred and sixty-one, be, and he is hereby, authorized to refuse a clearance to any vessel or other vehicle laden with

goods, wares, or merchandise, destined for a foreign or domestic port, whenever he shall have satisfactory reason to believe that such goods, wares, or merchandise, or any part thereof, whatever may be their ostensible destination, are intended for ports or places in possession or under control of insurgents against the United States; and if any vessel or other vehicle for which a clearance or permit shall have been refused by the Secretary of the Treasury, or by his order, as aforesaid, shall depart or attempt to depart for a foreign or domestic port without being duly cleared or permitted, such vessel or other vehicle, with her tackle, apparel, furniture, and cargo, shall be forfeited to the United States.

SEC. 2. *And be it further enacted*, That whenever a permit or clearance is granted for either a foreign or domestic port, it shall be lawful for the collector of the customs granting the same, if he shall deem it necessary, under the circumstances of the case, to require bond to be executed by the master or the owner of the vessel, in a penalty equal to the value of the cargo, and with sureties to the satisfaction of such collector, that the said cargo shall be delivered at the destination for which it is cleared or permitted, and that no part thereof shall be used in affording aid or comfort to any person or parties in insurrection against the authority of the United States.

SEC. 3. *And be it further enacted*, That the Secretary of the Treasury be, and he is hereby, further empowered to prohibit and prevent the transportation in any vessel, or upon any railroad, turnpike, or other road or means of transportation within the United States, of any goods, wares, or merchandise of whatever character, and whatever may be the ostensible destination of the same, in all cases where there shall be satisfactory reasons to believe that such goods, wares, or merchandise are intended for any place in the possession or under the control of insurgents against the United States; or that there is imminent danger that such goods, wares, or merchandise will fall into the possession or under the control of such insurgents; and he is further authorized, in all cases where he shall deem it expedient so to do, to require reasonable security to be given that goods, wares, or merchandise shall not be transported to any place under insurrectionary control, and shall not, in any way, be used to give aid or comfort to such insurgents, and he may establish all such general or special regulations as may be necessary or proper to carry into effect the purposes of this act. * * * (12 Stats., 404, 405.)

The omitted clause merely declares a forfeiture of goods carried unlawfully. The concluding sections do not concern us.

We contend that the bond in suit is good independently of the statute as well as under its third section.

I.

The collector had a right to use his judgment in granting or refusing a clearance. Said Washington, J., in Bas *v.* Steele, (3 Wash. C. C., 395, top): "The collector had two conflicting duties imposed upon him: one to the individual who asked a clearance; the other to his country. If the destination of the vessel was the enemy, he had a right to refuse a clearance; if not, and there were not circumstances to warrant his suspicions, he had no such right. He was to judge upon circumstances, and to proceed on such ground, as that any just man could say there did exist reasons to authorize the belief that this was the destination of the vessel."

The proof which the government offered to make (Record 10) shows the collector's apprehensions as to the destination of these goods were well founded. Now, it would be the *unlawful* refusal to grant a clearance that would make the bond, given to obtain it, void for duress. (Whitefield *v.* Longfellow, 13 Maine, 146.)

It does not appear that ever the bond of the master or owner was proffered. Such bond was for the benefit of the shippers. There was a privity and community of interest between the proprietors of the vessel and of the cargo, in respect to its transportation, that made it immaterial, as between them, which gave the bond; it enured to their joint benefit. If the shipowner or master could not or would not give the requisite security, with-

out which (or its equivalent) the collector was *bound* to refuse a clearance, and the consignor did execute and deliver the obligation in suit as such equivalent, it is too late to repudiate it now, after having accepted the benefit obtained by means of it.

The statute did not originate the right, nor create the duty of withholding a clearance from a vessel bound on a hostile errand, as is declared in Bas *v.* Steele, *ubi sup.;* it supplemented the declaration of that right and duty with a penalty to be imposed on all vessels attempting to sail without a clearance.

Nor is the bond intended to secure the performance of a mere statutory duty. It is the duty of every person within our territory during time of war, and owing us allegiance, permanent or temporary, to refrain from giving any aid or comfort to our enemies.

II.

The *third* section of the statute of May 20, 1862, c. 81, covers the case under discussion.

While it appears that the first ten lines contemplate inland or domestic transportation only, as contended by Mr. Mora, and held by the learned district judge, the remainder of the section goes on to *add* to these restrictions and regulations, so that they may cover *all* contingencies; "and he is *further* authorized, in *all* cases, *where he shall deem it expedient so to do*, to require reasonable security to be given that goods, wares, and merchandise shall not be transported to any place under insurrectionary control, and shall not in any way be used to give aid or comfort to such insurgents, and he may establish all such general or special regulations as

may be necessary or proper to carry into effect the *purposes* of this act."

Near the middle of page 8 of the record, folio 28, will be found the regulations made by the Secretary of the Treasury for the guidance of the collector in cases like the present, under that act. The regulations so made themselves have the force of law. (Gratiot *v.* United States, 4 Howard, 117.)

The first section of this act of May 20, 1862, authorizes the Secretary of the Treasury to refuse a clearance. In the first instance, the application for this document must, *ex necessitate*, be to the collector; and it is only when it is withheld by him that recourse can be had to the Secretary. But under this section, even, the acts of the Secretary must be done through his subordinates. (Hickey *v.* Huse, 56 Maine, 496, bottom.) It is enough that he directs them by general previous instructions. (United States *v.* Eliason, 16 Peters, 291; United States *v.* Freeman, 3 How., 566.) Unless appeal was taken, the act must be construed as that of the Secretary through his deputy. The vessel was about to depart on her voyage; the suspected goods formed but an insignificant fraction of her lading, so that the master would rather reland them than give bond equal to the value of the entire cargo; she is rightfully detained until bond is given; the owner of the goods, without appealing to the Secretary of the Treasury, or being able then (or now) to controvert the claim that there was reason to require security, tenders his own bond, in lieu of that which the owner of the vessel declines to give; the collector consents to accept it, and it is given: is this such an exaction of the bond as will avoid it? The bond was taken as a favor, because the more onerous one was not fur-

nished. There was only an exaction in this sense, that the vessel was not allowed to depart without any bond being given.

III.

The cases cited by the defendant will be briefly noticed:

Dixon *v.* United States, 1 Brock., 177, is only applicable if the defendant is correct in his assumption that the bond in suit was taken under the *second* section of the act of May 20, 1862, c. 81, which we deny, and therefore, in our view, this citation becomes immaterial. But, in relation to this case, in 1 Brock., as well as to that of United States *v.* Gordan, which (as reported in 7 Cranch, 287) has not the slightest applicability, I will add that the opinions in Speake *v.* United States, 9 Cranch, 28 to 39 (to which the court is respectfully referred), show that the rest of the court did not concur with the view the Chief Justice took of this subject.

In Taber *v.* United States, 1 Story, 1, the bond was given to procure the performance of "a supposed statute duty," where the statute imposed no such duty, and none existed at common law. As already remarked, the shipper's duty to render no aid and comfort to the enemy existed independently of statute. The same is true of United States *v.* Morgan, 3 Wash., 10.

EDWIN B. SMITH,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

UNITED STATES
v.
FAUSTO MORA. } *No.* 601.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE DEFENDANT IN ERROR.

COUDERT BROTHERS, *Attorneys for Defendant in Error.*

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

UNITED STATES
v.
FAUSTO MORA. } *No.* 601.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE DEFENDANT IN ERROR.

This is an action brought upon a bond, dated the 4th March, 1863, and executed by Leon Haas, Jr., William M. Congreve and the appellee. Mr. Haas was shipper of certain merchandise on the schooner Sarah Marsh, which was about leaving the port of New York with a cargo of merchandise, bound to the port of Matamoras, in Mexico (Record, fol. 5 and following).

The bond was "exacted" by the collector of the port of New York as a condition precedent to allowing the clearance of the schooner (fol. 25). The

declaration refers to no special Act of Congress as a warrant for this exaction, nor is it averred that any instruction, general or special, of the Secretary of the Treasury made it lawful (see Declaration).

It is clear that the collector intended to take a bond, such as was provided for by the second section of the Act of May 20, 1862. This will more fully appear in our points.

On the trial a motion was made to dismiss on the plaintiff's opening, which motion was granted (folio 35), and a verdict directed for the defendant. The learned Judge used the following language:

"If it is conceded that the bond is in double the "value of the cargo, that goes to the whole point.

"My view of this case is that it cannot be sus- "tained unless by the circumstances surrounding "it, it contains the elements of a voluntary contract "on the part of the defendants, either principal or "sureties, and it is conceded on the part of plain- "tiff that it cannot be sustained under section 2, as "a bond being taken under section 2 of the act of "May 20, 1862. The only question with me is "whether it can be supported under section 3 of "that act. Now, the Secretary of the Treasury is "empowered by that section to prohibit and prevent "the transportation in any vessel, &c. (quoting sec- "tions, &c., referred to).

"The two sections, section 2 and section 3, must "be construed together, and it seems not a reason-

"able construction to say that under section 3, un-
"der the general terms of that section the Secretary
"of the Treasury is specially authorized to do pre-
"cisely that thing for which, by the language of
"section 2, express power is given to him. That is
"to say, where one section of the law goes on and
"gives an express power to cause a certain thing to
"be done, you cannot by construction say that he
"is to have the same power by virtue of the same
"general words in another section of the State.

"My impression that the action cannot be main-
"tained, is very strong."

(Stenographer's notes of the trial.)

An adjournment having been had to the following Monday, the plaintiff's counsel made certain offers to prove, which were excluded, and the learned Judge then proceeded:

"I have no reason to change the views at which I
"arrived on Friday. I do not think the bond or
"contract or obligation can be supported at com-
"mon law, irrespective of the statute, because
"it was not a voluntary undertaking en-
"tered into by the parties desiring the clearance of
"the vessel. It cannot be supported as one which
"the collector had authority to take, because he
"imposed a penalty in double the amount of the
"sum which Congress authorized him to require as
"security for granting the clearance. Under such
"circumstances as those under which this one was

"granted, it cannot be supported under the general "power given to the Secretary of the Treasury, be- "cause the whole Statute must be construed to- "gether. And when Congress has indicated the "precise nature of the security to be taken in a "particular case, under a general clause empower- "ing the Secretary to make other reasonable regu- "lations, it cannot be admitted that it was intended "to abrogate the provisions which Congress so "specially imposed. Because if that were so there "would be no necessity for the Second Section at "all. In this case, therefore, the Court will direct "the jury to render a verdict for the defendants."

POINTS.

I.

It is clear that the intention of the Collector in exacting the bond was to require such an undertaking as was justified by the 2d section of the act of May 20, 1862, 12th Statutes at large, p. 404. It cannot be plausibly argued that the bond thus exacted derives any validity from the first section of the act, for that, by its terms, gives power to the *Secretary of the Treasury* in his discretion to refuse a clearance, under certain circumstances; any vessel attempting to depart after such refusal is to be forfeited with her cargo.

By the 3d section the Secretary of the Treasury is "empowered to prohibit and prevent the *trans-*

"*portation in any vessel, or upon any railroad,*
"*turnpike or other road or means of transporta-*
"*tion within the United States,* of any goods, wares
"merchandise of whatever character, and whatever
"may be the ostensible destination of the same, in
"all cases where there shall be satisfactory reasons
"to believe that such goods, wares or merchan-
"dise are intended for any place in the possession
"or under the control of insurgents against the
"United States; or that there is imminent danger
"that such goods, wares, or merchandise will fall
"into the possession or under the control of such
"insurgents; and he is further authorized, in all
"cases where he shall deem it expedient so to do,
"to require reasonable security to be given that
"goods, wares or merchandise shall not be trans-
"ported to any place under insurrectionary control,
"and shall not, in any way, be used to give aid or
"comfort to such insurgents, and he may establish
"all such general or special regulations as may be
"necessary or proper to carry into effect the pur-
"poses of this act; and if any goods, wares or mer-
"chandise shall be transported in violation of this
"act, or of any regulation of the Secretary of the
"Treasury, established in pursuance thereof, or if
"any attempt shall be made so to transport them,
"all goods, wares or merchandise, so transported or
"attempted to be transported, shall be forfeited to
"the United States."

With reference to this 3d Section it will be observed:

1st. Section 3 evidently intended to cover the case of "goods transported within the limits of the United States."

2d. By its terms it is intended to apply only to cases where there was satisfactory reason to suspect that such goods were to be transported to places within the rebel lines or that there was imminent danger that they would fall into the possession or under the control of the insurgents. It can hardly be claimed, that the word "transportation" in this section involved any idea of carriage beyond the actual and avowed destination, provided, that destination was a lawful one. Here the goods were cleared for Matamoras, and were actually transported there.

3d. If this be not the true sense of section 3, why pass section 2 at all?

The reasoning of the learned Judge below upon this 3d article is, we respectfully submit, entirely sound.

This is in no sense a voluntary bond. Indeed, to hold that a bond *exacted* by the collector from a merchant in his business of exporting goods, as a condition precedent to allowing the transportation of those goods, is a contradiction in terms. There

are none of the elements of a voluntary contract about it.

The goods were on the ship; they could not sail without the clearance; the collector claimed the right to withhold that clearance until a certain obligation was given; that obligation was given, under that compulsion, for the purpose of obtaining such clearance. In what sense can such an obligation, where the power is all on one side, and the obligation to submit all on the other, be treated as a voluntary contract? The authorities are uniform on this point, and none of the cases cited by the learned counsel for the appellant establish his proposition. The point was raised and decided by Chief Justice Marshall in *Dickinson* v. *U. S.*, 1*st Breckenridge*, 177, and he arrived at the conclusion that bonds taken by the government by one of its officers to prevent the commission of an act rendered culpable by statute, if not valid under the statute, cannot be supported at common law so as to warrant the recovery of damages. So a bond exacted contrary to law was held void in *Taber* v. *U. S.*, 1 *Story's R.*

The identical point here made by the appellees was held good in the *U. S.* v. *Gordon*, 7 *Cranch*, 287, where it was decided that a bond in more than double the value of the vessel and cargo, which the master was constrained to execute by the refusal of the clearance, was void. See also *U. S.* v. *Morgan*, 3 *Wash.*, *C. C.* 10.

Again, where a statute prescribes the condition of

a bond, its provisions must be strictly complied with or the bond will be void (*Barnard* v. *Viele*, 21 *Wend.*, 88). This bond is highly penal, and like all penal bonds should be strictly construed. It differs in this from the bond under consideration in the case of *U. S.* v. *Hodson*, 10 *Wall*, 395, which is cited by the learned counsel for the appellant. It was there held that the bond *was given for revenue purposes, and that revenue statutes are not regarded as penal*, and *therefore not to be construed strictly.* In that case it was held that the U. S. had a direct pecuniary interest in such a matter as the one involved, and that where a contract is voluntarily entered into, and the principal enjoys the benefits which it is intended to secure, and a breach occurs, it is then too late to raise the question of its validity. That cannot be said to be the case here.

It should be moreover observed that such an undertaking as the one examined in Hodson's case was one of a class different in another particular, the principal was bound to give *a* bond. Here, on the contrary, *no* bond was required of a shipper, as a rule. It was only where special circumstances in the judgment of the Collector required it that he was authorized to exact a particular form of undertaking (Sec. 2d). The language of the Statute in this case should be strictly construed. Courts will not give an equitable construction to penal Statutes. (*Ferrett* v. *Atwil*, 1 *Blatchf. C. C. R.*, 156.)

The case of the *United States* v. *Tingey*, 5 *Peters*, 115, although cited by our learned adversary, directly sustains our proposition. The plea interposed by the defendant, a surety occupying precisely the same position as the defendant in this case, recited that the bond in suit, with a condition varying from that prescribed by law, was under color of office extorted from Deblois and his sureties, contrary to the Statute, by the then Secretary of the Navy, as the condition of his remaining in the office of purser, and receiving its emoluments.

The Court used the following language:

"There is no pretence, then, to say that it was "a bond voluntarily given, or that though different "from the form prescribed by the statute, it was "received and executed without objection. It was "demanded of the party, upon the peril of losing "his office; it was extorted under color of office "against the requisitions of the statute. It was "plainly, then, an illegal bond, for no officer of the "government has a right, by color of his office, to "require from any subordinate officer, as a condition of holding office, that he should execute a "bond with a condition different from that prescribed by law. That would be not to execute but "to supersede the requisitions of the law," and the plea was held good.

III.

There is no reason or ground alleged in the declar-

ation to explain or justify the exaction of the Bond.

It is not pretended that there was any "satisfactory reason" to believe that the goods laden on the "Sarah Marsh" were intended for ports or places in the possession or under the control of the insurgents against the United States, as provided in the 1st section of the law. Nor is it pretended that there was a "satisfactory reason" to believe that those circumstances existed which allowed the exaction of "reasonable security" to be given, as provided in section 3. It is not stated, although it is left to inference, that the Collector of the Customs deemed it necessary to require the exaction of an undertaking as under section 2.

Some reference to the statute should have been made. "Reference to the statute is necessary in "penal actions founded on the statute" (*Sedgwick on Stat. & Const. Law*, 114; *Shaw* v. *Tobias*, 3 *Comst.*, 188).

But even admitting that the vague, loose and general phraseology of the declaration in this action is sufficient to warrant the relief demanded, provided the statute covers the case, it is very clear that that language will not authorize the plaintiffs to rest their case upon Treasury or other regulations to which the attention of the defendant has not been called. This would seem to be an elementary proposition. Neither the defendant nor the Courts are bound to take cognizance of these

regulations. Common justice requires that where a party is sought to be charged with the payment of money, or with imprisonment or any other punishment for the violation of such rules, he should be distinctly apprised of the charge made against him. In an action on a Statute, the party prosecuting must allege every fact necessary to make out the offence, and must bring the offence charged clearly within the Statute, whether looking to its language or its spirit (*Jones* v. *Van Zandt*, 5 *How., U. S. R.*, 64).

The declaration is materially defective, for to lay the foundation of a recovery the proof must go further than the allegation it contains (*Stanley* v. *Quippel*, 2 *McLean*, 35; *Walker* v. *Johnson*, 2*d Do.*, 92.)

IV.

Nor is it an answer to say that the regulations, although irrelevant to the case, are nevertheless binding because of their actual introduction into the case. They are not in any way connected with the subject matter of this suit. It is not pretended in the declaration that the bond was taken under such regulations. For what purpose they were offered does not appear, but even if the circular letter thus produced without any prior notice to the defendant could possibly be considered evidence, it could not effectually go beyond the law which covers these

matters, and create a stricter liability or impose a greater burden than that law itself contemplated.

V.

That the bond in question was exacted and given under the second Section of the Act is not only plain from a mere inspection of that Section and the bond, but the fact has always been conceded that similar bonds were in fact based upon that Section. The various grounds taken more recently in this case are evidently afterthoughts. The diplomatic correspondence of the United States during our civil war shows beyond any controversy that those obligations were so taken. For the information and convenience of the Court we submit some extracts upon this point.

In December, 1863, Mr. Archibald, Consul of Great Britain, wrote to Lord Lyons, as follows:

"The vague and almost impossible obligations into "which shippers are required to enter, the peculiar "qualification demanded in regard to the sureties, "and the uncertainty as to the nature of the proof "requisite for the cancellation of the bond, which "may be held indefinitely against the obligors, "create burdens serious and oppressive, if not al- "most prohibitory of the legitimate trade with "British and colonial ports" (see Message and Documents, Department of State, No. 2, 1864-5, p. 470.)

In the month of February of the following year Lord Lyons wrote to Mr. Seward, remonstrating against the restrictions placed upon the trade between New York and places within the Queen's dominions, and enclosing extracts from the Consul's despatches.

On the 17th March of the same year, Mr. Seward wrote to Lord Lyons, stating that he had submitted the remonstrance of Lord Lyons to the Secretary of the Treasury, and enclosed copy bond, and said in reference to its exaction of double the amount of the value of the cargo:

"In this the collector is believed to have exceeded "the requirements of the Act above stated, and he "has been so informed." This letter shows such bond to have been exacted under the Act of May 20, 1862, § 2. It never occurred to the distinguished gentlemen who were at the head of the Treasury and State Departments that they could justify the illegal action of their subordinate officers by citing a Treasury circular.

VI.

Assuming the bond to have been exacted under the second section of the Act, it cannot be sustained. It is not executed by the master or the owner of the vessel, nor is it in a penalty *equal* to the value of the cargo; the penalty is double the value of the cargo, and, therefore, the bond is void.

The case above cited by us of the *United States* v. *Gordon*, 7 *Cranch*, 287, is directly and literally in point. In this case the defendant was met with precisely the same question that arises here.

"And the said defendants, for further plea why "the U. S. ought not to have and maintain the said "action, say that the said bond was given and exe- "cuted for more than double the value of the ves- "sel and cargo mentioned in the recital and condi- "tion of the said bond, to wit: in a sum of $8,000, "more than double the said value; and the said last- "mentioned defendants aver that the obligors were "constrained to execute the said bond by the re- "fusal of the Collector of the Port of Tappahanock "to clear and permit the said vessel and her cargo "to depart from the port and district of Tappahan- "ock until the same bond was executed as afore- "said, and thus they are ready to verify, &c."

To this plea there was a general demurrer, which was overruled by the District Judge, and his decision affirmed by Chief Justice Marshal in the Circuit Court. (See also *Schr. "Paulina" Cargo* v. *U. S.*, 7 *Cranch*, 52–60; *also Jones* v. *Van Zandt*, *How. U. S.*, 67.)

VII.

There being no warrant in the law for this bond, even the very broad offers of the plaintiff's counsel

cannot cure this fatal defect. They might perhaps have been useful if it was sought to influence the jury in times of political excitement, but they could not bear upon the case or affect the mind of an upright magistrate. It is not necessary to comment in detail upon them, but we respectfully submit that the ruling of the learned Judge below was correct, and the judgment should be affirmed.

New York, April 18, 1878.

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